IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1886 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

EXECUTIVE ENGINEER

Versus

ASHOKBHAI J DESAI

Appearance:

MS SEJAL K MANDAVIA for the Petitioner.

MR PUSHPADATTA VYAS for the Respondent.

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 12/12/2003

ORAL JUDGEMENT

1. By filing this petition, which is in the nature of Article 227 of the Constitution of India, the petitioner has challenged the order passed by the Presiding Judge, Labour Court, Nadiad in Reference (LCN) No.155 of 1992.

2. The respondent-workman had raised an industrial dispute, challenging the decision of the petitioner-Management in not continuing him in service as a daily rated driver. The dispute was referred to the Labour Court, Nadiad and it was numbered as Reference (LCN) No.155 of 1992. The respondent was appointed as a daily rated driver from 1.11.1989. It is his case that he was serving sincerely and satisfactorily, on a daily wage of Rs.37.60, and that he had served continuously upto 1.5.1991, i.e. the date on which he was relieved from services. According to him, his services were illegally terminated with effect from 1.5.1991 and he was told that his services were no longer required. It is also his case that after terminating his services, the petitioner-Department appointed someone else in the aforesaid post of Driver. Under the circumstances, a demand was raised by the concerned workman to the effect that he may be reinstated in service, with continuity of service and such other benefits.

3. The demand of the workman was resisted by the petitioner-Department on the ground that the petitioner-institution cannot be said to be an 'Industry', within the meaning of the Industrial Disputes Act, as the Institution is under the control of the Irrigation Department of Sardar Sarovar Narmada Irrigation Scheme. It is further the stand of the Management that the concerned workman was not relieved, but since he was appointed as a casual driver, as and when need of a driver arose, he was asked to perform his duty. It is also the case of the Department that the workman was not recruited as per the Rules and for some intervening days, he was asked to give his services till regular driver was recruited by the Department.

On the above and such other grounds, the demand was resisted by the petitioner-Department.

4. At page 20 in the compilation, the Labour Court has also considered the say of the petitioner-Department to the effect that no appointment order was given to the respondent-workman and only as a stop-gap arrangement, he was asked to perform his duties as and when there was a need. Evidence of the concerned workman is also discussed by the learned Judge, wherein the concerned workman said that no provident fund was deducted from his salary and as and when the regular driver had taken over, he was not asked to perform his duty thereafter.

5. After considering the evidence on record, the

Labour Court observed that it is not proved that the respondent was retrenched by the Department. It is also found that the workman has failed to prove that after terminating his services, someone else is appointed in his place. A specific finding is given by the Labour Court to the effect that the action of the petitioner-Department in not asking the respondent-workman to discharge his duty further cannot be treated as a 'retrenchment' in any manner whatsoever. However, in spite of this positive finding given by the Labour Court, at page 23 in the compilation, the Labour Court has still passed the order of reinstatement without any benefit for the intervening period.

However, in the English translation of the Award which is produced in the compilation, there is no clear mention that it is not a case of retrenchment. Therefore, I have gone through the Gujarati version of the Award, as the original Award of the Labour Court is in Gujarati, and, there is a specific mention in paragraph 5 of the Award by the Labour Court that there is no retrenchment.

6. On behalf of the petitioner, it is submitted that when the Court has not given any finding to the effect that the concerned workman has served for 240 days in a calendar year, especially when the Court has also observed that the action of the petitioner in not asking the concerned workman to discharge his duty further in view of the appointment of the regular driver, cannot be treated as 'retrenchment' of the petitioner, the order of the Labour Court in directing reinstatement is without jurisdiction.

7. I have gone through the award of the Labour Court and I have considered the submissions made by learned Advocates for both the sides. In my view, the order of the Labour Court is not sustainable at all. It is required to be noted that the Labour court itself has found that the action of the Management cannot be said to be retrenchment of the respondent-workman. It is also required to be noted that as and when some work was available, the respondent was called to discharge his duty as a driver and that, he was not given any appointment order. The Labour Court has also not given any positive finding as to the total period, during which the respondent has continuously worked. In absence of the said finding, as well as in view of the clear finding of the Court to the effect that there is no retrenchment in the eye of law, in my view, the Court has no jurisdiction to pass an order of reinstatement, which is

ultimately passed by the Labour Court. When the Labour Court itself has found that there is no retrenchment and that the action of the Management cannot be said to be illegal in any manner, and that the respondent was not given any appointment order and without there being any finding by the Labour Court that the respondent has worked for 240 days in a calendar year, the Labour Court has no jurisdiction to pass the impugned order of reinstatement and hence, the order of the Labour Court is contrary to law and the same is unsustainable. The Labour Court can grant appropriate relief if it is proved that the action of the management is in breach of the provisions of the I.D. Act. It is also not found that the Management has acted in violation of the provisions of Section 25-F of the I.D. Act when the Petitioner did not ask the respondent to discharge his duty any further in view of the appointment of the regular driver.

8. In the above view of the matter, the order of reinstatement is required to be set aside and it is accordingly, set aside. The order of the Labour Court is quashed and set aside. Rule is made absolute accordingly. Interim relief is vacated. No costs.

It is, however, clarified that if any benefit is given to the respondent under the provisions of Section 17-B of the I.D. Act, the said amount need not be recovered from the concerned workman.

9. At this stage, Mr.Vyas, who is appearing for the respondent, submitted that on 10.4.2003, this Court (Coram : H.K. Rathod, J.) passed the following order in Civil Application No.2385 of 2003 filed by the present respondent in Special Civil Application No.1886 of 1999 :-

" ... ...

Heard learned advocate Mr.P.J. Vays on behalf of the original respondent / present applicant and Ms.Sejal K. Mandavia on behalf of the original petitioner / present opponent.

2. The present application is filed by the original respondent under Section 17B of the Industrial Disputes Act, 1947 ('the Act' for short) as reinstatement has been stayed by this Court. Learned advocate Ms.Sejal K. Mandavia appearing on behalf of the original petitioner/present opponent has submitted that as and when the respondent workman will file an

affidavit under Section 17B of the Act and supply copy to the original petitioner, then the original petitioner will pay the last drawn monthly wages inclusive maintenance allowance to the respondent workman from the date of award. She has also made it clear that earlier also this Court has granted stay subject to compliance of Section 17B of the Act, therefore, there is no need to pass further order.

3. I have considered the submissions made by both the learned advocates. In view of statement made by learned advocate Ms.S.K. Mandavia it is directed to respondent workman to file an affidavit as required under Section 17B of I.D. Act, 1947 within a period of 15 days from the date of receiving the copy of order. It is further directed to original petitioner that after receiving affidavit from the respondent workman, to pay last drawn monthly wages inclusive if any, maintenance allowance from the date of award, i.e. 9.10.1998 to 31.3.2003 within a period of 2 months from the date of receiving affidavit from respondent-workman and to further direct to pay regularly last drawn monthly wages inclusive maintenance allowance during pendency of petition without fail.

4. In view of the above observation and direction, this application is disposed of.

5. Having considered the request made by learned Ms.Sejal K. Mandavia, Special Civil Application No.1886 of 2002 is fixed for final hearing in the 3rd week of August, 2003. Office is directed to notify the same for final hearing accordingly.

... ..."

It is submitted by Mr.Vyas that in spite of the above order of this Court, the petitioner has not complied with the said order passed under the provisions of Section 17-B of the I.D. Act. If that be so, the order which is passed by this Court under Section 17-B of the I.D. Act should be complied with by the petitioner irrespective of the final order and if it is not done, the respondent can take appropriate proceedings for recovering the amount, which was directed to be given by this Court. Ms.Mandavia, learned Advocate for the petitioner, fairly submitted that if the benefit under

Section 17-B of the Act is required to be paid in view of the interim order of this Court, the same will be paid forthwith and in any case, within a period of two months from today. The said statement is recorded.

10. Mr.Vyas, learned Advocate for the respondent, has relied on the decision of the Apex Court in V.O. Corpn. Ltd. v. Hindustan Veg. Oils Corporation Ltd. and others, 2001 AIR SCW 2282.

In the aforesaid decision, a Civil Appeal was filed before the Honourable Supreme Court, challenging the decision of a Division Bench of the High Court at Calcutta, holding that the writ petition filed by the appellants therein and their application under Section 17-B of the I.D. Act should be disposed of together, expeditiously. The Honourable Supreme Court held that the application under Section 17-B of the I.D. Act filed during the pendency of the writ petition, should be disposed of before the principal petition and with great promptitude. In the said decision, the Apex Court held as under :-

" ... The order under challenge has been passed by a Division Bench of the High Court at Calcutta. Its operative portion states that the writ petition filed by the present appellants and their application under Section 17-B of the Industrial Disputes Act should be disposed of together, expeditiously. We are of the view that an application under Section 17-B should be disposed of before the principal petition and it should be disposed of most expeditiously.

We, therefore, set aside the order under challenge to the extent that it requires the disposal of the writ petition and the S.17-B application together and we direct that the S.17-B application should be disposed of with great promptitude and before the disposal of the writ petition.

The S.17-B application shall be listed before a learned Single Judge of the Calcutta High Court expeditiously, and the parties may seek a fixed date of hearing. It shall be open to the parties to raise all contentions in support of and against the application. It shall also be open to the first respondent to rely upon the order of the B.I.F.R. that it states has been passed.

The Civil Appeal is allowed accordingly...."

Since the matter has reached for final hearing, the same is required to be disposed of, keeping the right of the petitioner for getting appropriate relief under Section 17-B of the I.D. Act intact.

11. Mr.Vyas, learned Advocate for the respondent, then submitted that since the petitioner has not complied with the order passed by this Court directing the petitioner to comply with the provisions of Section 17-B of the I.D. Act, the petition is required to be dismissed. However, as stated above, Ms.Mandavia, learned Advocate for the petitioner, fairly submitted that if the benefit under Section 17-B of the Act is required to be paid in view of the interim order of this Court, the same will be paid forthwith and in any case, within a period of two months from today. Apart from that, Ms.Mandavia, learned Advocate for the petitioner, relied on the decision of the Apex Court Hindustan Zinc Ltd. v. Industrial Tribunal and another, (2001) 10 SCC 211. In the said decision, the Industrial Tribunal granted relief, holding that the dismissal of the workman was illegal. Challenging the Industrial Tribunal's Award, the employer filed a writ petition under Article 226 of the Constitution of India. The High Court dismissed the said writ petition on the ground that the High Court's interim order under Section 17-B of the I.D. Act was not complied with. The Honourable Supreme Court allowed the appeal of the employer, holding that the High Court ought to have decided the case on merits. In the said decision, the Apex Court held as under :-

" ... ...

Challenging the award made by the Industrial Tribunal holding that the dismissal of the respondent workman was illegal and directing his reinstatement with continuity of service and full back wages and all other attending benefits, a writ petition was preferred. In the writ petition, learned Single Judge who disposed of the matter noticed that the Tribunal had upheld the validity of the enquiry ending with the termination of the service of respondent 2. However, on merits, the High Court reached the conclusion that the charges/allegation made against the workman concerned are not proved. The High Court without examining the contentions regarding the correctness of the conclusion

reached by the Tribunal, firstly, as to the scope of interference when the validity of the domestic enquiry had been upheld and secondly, on merits of the matter decided the writ petition. The High Court noticed that the order made under Section 17-B of the Industrial Disputes Act, 1947, had not been complied with and therefore there was no necessity to go into the merits of the case. This conclusion is rather surprising. The High Court ought to have dealt with the merits of the case and decided the case but it went at a tangent and proceeded to dispose of the matter for non-compliance with the interim order made by the High Court. Under the circumstances, we set aside the order made by the High Court and remit the matter back to the High Court for fresh consideration in accordance with law. Considering the fact that Respondent 2 workman had been terminated from service as early as the year 1980, we hope the High Court will dispose of the mater as expeditiously as possible. The appeal is accordingly allowed. There will be no order as to costs.

... ..."

12. Ms.Mandavia, however, submited that whatever amont which is required to be paid to the respondent under Section 17-B of the I.D. Act, will be paid within a period of two months and Ms.Mandavia submitted that because of lack of communication, in view of the fact that the particular office of the petitioner-Department is closed, this delay has occurred. She further submitted that the matter is already a fixed matter and, therefore, the same is required to be disposed of on merits.

13. Mr.Vyas, learned Advocate for the respondent, however, submitted that if the order is passed in violation of the provisions of Section 25-F of the I.D. Act, the order of termination is required to be set aside. To substantiate his aforesaid say, Mr.Vyas relied upon the decision of this Court in Chief Officer, Keshod Municipality v. Chandrakant Harilal Rakholiya, { 2003 (2) } XLIV (2) GLR 1755. In the said decision, while terminating the services of the workmen, provisions of Section 25-F of the I.D. Act were not complied with. Upholding the order passed by the Labour Court, reinstating the workmen with full back wages, it was observed therein that when no evidence was led by the employer before the Labour Court, controverting the claim

of the workmen and there is nothing to show that the workmen were gainfully employed after their services were terminated, the petition filed by the employer is required to be dismissed and it is accordingly dismissed.

However, in the instant case, the Labour Court itself has found that there is no violation of Section 25-F of the I.D. Act, as there is no retrenchment. The said judgment is, therefore, not applicable to the facts of the case in view of the finding given by the Labour Court itself.

14. It is next submitted by Mr.Vyas that the powers of this Court under Article 227 of the Constitution of India are limited and since the order passed by the Labour Court is just and proper, this Court may not interfere with the said order in exercise of its extraordinary jurisdiction under Article 227 of the Constitution. However, in my view, as aforesaid, the order of the Labour Court is absolutely unsustainable and once the Court has come to the conclusion that there is no breach of any of the provisions of the Industrial Disputes Act, the Court has no jurisdiction to pass an order of reinstatement. The Labour Court has, therefore, committed a grave error of law as well as of jurisdiction in passing the impugned order and, therefore, the order of the Labour Court is required to be corrected by this Court under Article 227 of the Constitution of India.

Accordingly, the order of the Labour Court is quashed and set aside. Rule is made absolute accordingly. Interim relief is vacated. No costs.

15. Ms.Mandavia submitted that the order under Section 17-B of the I.D. Act will be complied with, without fail, and that, positively, it will be carried out, within the stipulated time. She has also submitted that she will communicate this order to the Head Office and whatever amount, which is required to be paid to the respondent, till today, will be paid within a period of two months.

12.12.2003 (P.B. Majmudar, J.)

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(apj)